HAW TUA TAU v. PUBLIC PROSECUTOR
TAN AH TEE v. PUBLIC PROSECUTOR
LOW HONG ENG v. PUBLIC PROSECUTOR

[Privy Council (Lord Diplock, Lord Fraser of Tulleybelton, Lord Scarman, Lord Roskill & Sir Ninian Stephen) April 30 & June 22, 1981]

[Privy Council Appeals No. 56 of 1980 & Nos. 22 & 23 of 1981]

Constitutional Law — Whether Act of Parliament inconsistent with Constitution — Amendment to Criminal Procedure Code — Accused called upon to give evidence — Whether procedure introduced contrary to fundamental rule of natural justice — Privilege against self-incrimination — Accused not compelled to give evidence and to submit to cross-examination — Adverse inferences from failure to do so — Criminal Procedure Code (Cap. 113), ss. 188, 189, 190 & 195 — Constitution of Singapore, arts. 4 & 9(1).

Criminal Law and Procedure — Procedure before High Court — When accused to be called to enter on his defence — Accused called upon to give evidence — Inferences to be drawn from failure to do so — Whether procedure contrary to rules of natural justice — Constitution of Singapore, arts. 4 & 9(1) — Criminal Procedure Code (Cap. 113), ss. 188, 189, 190 & 195.

In these cases the appellants had been charged and convicted of the offences of murder and of trafficking in drugs (see [1980] 1 M.L.J. 49) respectively. They were sentenced to death. At the end of the prosecution case in each of the cases the presiding judge addressed the accused and called upon him or her to give evidence; each of the accused, after consulting, Counsel, gave evidence on his or her behalf. The appeals of the appellants to the Court of Criminal Appeal were dismissed. Special leave was given to appeal to raise the question whether the Criminal Procedure Code (Amendment) Act 1976, which introduced the new procedure, was inconsistent with the Constitution. It was argued that the amendments were contrary to the fundamental rule of natural justice, the privilege against self-incrimination.

Held: (1) section 195(3) of the Criminal Procedure Code makes it clear that the accused has a legal right to refuse to give evidence at his trial. The accused is not compelled in law to give evidence on his own behalf;

(2) the inferences that the court may draw from the failure to testify are not enlarged by the amendments to the Code. They are limited as they always have been to such inferences as appear to the decider of fact to be proper in the particular case having regard to all the circumstances;

(3) the amendments to the Criminal Procedure Code made by the Criminal Procedure Code (Amendment) Act, 1976, are consistent with the Constitution of Singapore and are valid.

Semble: At the end of the prosecution's case what has to be decided is a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which if he were to accept as accurate, would establish each essential element in the allegal offence. If such evidence as respects any of those essential elements is lacking, then and then only, is he justified in finding that "no case against the accused has been made out which if unrebutted would warrant his conviction" within the meaning of section 188(1) of the Criminal Procedure Code. Where he has not so found he must call upon the accused to enter upon his defence, and as decider of fact he must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

Cases referred to:-

(1) *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64; [1980] 3 W.L.R. 855.

(2) *Ong Kiang Kek* v. *Public Prosecutor* [1970] 2 M.L.J. 283.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Louis Blom-Cooper Q.C. (*A. Newman* with him) for the 1st appellant.

George Newman Q.C. for the 2nd appellant.

George Newman Q.C. (*George Warr* with him) for the 3rd appellant.

Stuart McKinnan Q.C. (*Jonathan Havie* and *Richard King*).

Cur. Adv. Vult.

Lord Diplock (delivering the judgment of the Court): These three appeals from the Court of Criminal Appeal of Singapore, which were heard together because they raised a single and identical point of law, arise out of two separate trials for different capital offences that were tried before two judges of the High Court under the section that bears the number 193 in the 1980 reprint of the Criminal Procedure Code. Throughout these reasons for their decision dismissing the appeals, which was given orally on April 30, 1981, their Lordships will refer to the relevant sections of the Criminal Procedure Code as they are numbered in the current reprint.

Haw Tua Tau was charged with the murder of two persons. He was convicted of both offences by the unanimous decision of the two High Court judges (Chua and Rajah JJ.). He appealed against his conviction to the Court of Criminal Appeal, and his appeal was dismissed on September 7, 1979. Low Hong Eng and Tan Ah Tee were charged jointly with trafficking in 459.3 grams of diamorphine — a quantity that attracts a mandatory death penalty under the Misuse of Drugs (Amendment) Act, 1975. They were convicted of that offence by the unanimous decision of Choor Singh J. and Rajah J., and their appeals against their convictions were dismissed by the Court of Criminal Appeal on October 10, 1979.

It is unnecessary for their Lordships to say anything about the various grounds relied on by any of the appellants in the Court of Criminal Appeal. They were plainly without merit and none of them was pursued before this Board. Nor is it necessary to say anything more about the evidence at either of the trials that led to the convictions of the appellants, except that in each of them, at the conclusion of the prosecution's case, the presiding judge addressed to the accused what since the passing of the Criminal Procedure Code (Amendment) Act, 1976 (Act No. 10 of 1976), has become the standard allocution, and formally called upon them to give evidence; each of the accused, after consulting counsel, did in fact give evidence in his or her defence.

The standard allocution, which their Lordships will set out later in these reasons, follows closely the terms of sections 188(2) and 195(1), (2) and (3) of the Criminal Procedure Code which were inserted in the Code by Act No. 10 of 1976 and abolished the previously existing right of the accused to make an unsworn statement without subjecting himself to cross-examination. The only question argued before this Board was the contention, common to all three appellants, that the amendments made to the Criminal Procedure Code by Act No. 10 of 1976 were inconsistent

with Article 9(1) of the Constitution of Singapore that "No person shall be deprived of his life or personal liberty save in accordance with law" and, being inconsistent, were rendered void by Article 4.

The whole foundation of the argument on which this contention was based was the interpretation that this Board had placed on the expression "law" in the context of Article 9(1) in the case of *Ong Ah Chuan* v. *Public Prosecutor*.[1] The Board's judgment in that case was delivered on October 15, 1980, more than a year after the judgments of the Court of Criminal Appeal of Singapore in the instant appeals; so the point about the unconstitutionality of the amending Act No. 10 of 1976 for inconsistency with Article 9(1) of the Constitution, in the form that it was presented to their Lordships in the instant appeals, was not available to be taken by the appellants in the Court of Criminal Appeal.

It was this exceptional circumstance, coupled with the fact that these are capital cases, that induced this Board to give special leave to appeal in order to raise the question of the inconsistency of Act No. 10 of 1976 with Article 9(1) of the Constitution of Singapore, notwithstanding that the point was not taken in the courts in Singapore. In doing so their Lordships had no intention of departing from the policy declared in *Ong Ah Chuan* v. *Public Prosecutor* (at page 859) that if at the conclusion of the argument they had entertained any doubt as to the constitutionality of an impugned Act of the Singapore Parliament they would have remitted the case to the Court of Criminal Appeal to hear argument upon the constitutional point so that this Board might have the benefit of that court's opinion before reaching its own final decision. In the result, however, the arguments that have been addressed to them have not succeeded in raising in their Lordships' minds any doubt as to the constitutionality of sections 188(2) and 195(1), (2) and (3) of the Criminal Procedure Code; so no prior remission to the Court of Criminal Appeal was needed in order to enable the decision to be given on April 30, 1981 at the conclusion of the argument in these appeals.

The passage in the judgment of this Board in *Ong Ah Chuan* v. *Public Prosecutor*, upon which the appellants relied, appeared in a part of that judgment that was disposing of an extreme contention that had been made on behalf of the Public Prosecutor: that so long as the deprivation of life or personal liberty was authorised by a written law passed by the Parliament of Singapore, there could be no breach of Article 9(1) of the Constitution, however arbitrary and procedurally unfair that written law might be. What the Board said (at page 865) in answer to that extreme contention was:

> "In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by article 5) of articles 9(1) and 12(1) would be little better than a mockery."

The subsequent paragraphs of the judgment made clear their Lordships' view that neither Article 9(1) nor 12(1) called for the perpetuation of the rules of criminal procedure or of evidence as they existed in Singapore when the Constitution came into force on September 16, 1963. So no amendment to the Constitution is needed to empower the legislature of Singapore (the President and Parliament) to enact whatever laws it thinks appropriate to regulate the procedure to be followed at the trial of criminal offences by courts in Singapore; subject only to the limitation that so long as Article 9(1) remains unamended such procedure does not offend against some fundamental rule of natural justice. It must not be obviously unfair. So the question for their Lordships is not whether Act No. 10 of 1976 made a significant alteration to the disadvantage of accused persons in the procedure previously followed in criminal trials in Singapore (as indisputably it does), but whether the consequence of the alteration is a procedure for the trial of criminal offences that is contrary to some fundamental rule of natural justice.

It would be imprudent of their Lordships to attempt to make a comprehensive list of what constitute fundamental rules of natural justice applicable to procedure for determining the guilt of a person charged with a criminal offence. Nor is this necessary in order to dispose of these three appeals. The only rule alleged to be the fundamental rule of natural justice, against which the appellants claim Act No. 10 of 1976 offends, is the so-called privilege against self-incrimination as expressed in the latin maxim *nemo debet se ipsum prodere*.

Under the Criminal Procedure Code as it stood when the Constitution came into force in 1963, the accused had the option of either making an unsworn statement from the dock on which he could not be cross-examined, or of giving evidence on oath or affirmation and thereby submitting himself for cross-examination too. This option had been enjoyed in England since the Criminal Evidence Act of 1898 first made persons accused of felony competent, though not compellable, witnesses in their own defence. The continued retention of this option on the part of the accused has been the subject of consideration and report in England by the Criminal Law Revision Committee in 1972. They strongly recommended its abolition and made provision for this in clauses 4 and 5 of the draft Bill annexed to their Report (Cmnd. 4991). No effect has yet been given to this recommendation by the Parliament of the United Kingdom; and in the meantime the recommendation has been reinforced by the approval of the Royal Commission on Criminal Procedure (in England) which reported as recently as January 1981 (Cmnd. 8092). That the Parliament of Singapore for its part was aware of and approved and adopted this recommendation of the English Criminal Law Revision Committee as applicable to criminal procedure in Singapore is evident from the fact that

the scheme and actual language of the amendments to the Criminal Procedure Code made by Act No. 10 of 1976 are based on and follow closely the wording of clauses 4 and 5 of the draft Bill annexed to that Committee's Report in 1972. Although recognising that it is not impossible, their Lordships would regard it as surprising if the distinguished English judges, jurists and legal practitioners who composed that Committee should have recommended for adoption in England a procedure that was contrary to a fundamental rule of natural justice.

To put the matter in perspective the provisions of the Criminal Procedure Code which it is convenient to set out are sections 188(1) and (2), 189(1) to (3), 190 and 195(1) to (3), of which 188(2) and 195(1) to (3) were inserted by Act No. 10 of 1976.

These provisions read as follows: —

"188.—(1) When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal or, if it does not so find, shall call on the accused to enter on his defence.

(2) Before any evidence is called for the defence, the court shall tell the accused that he will be called upon by the court to give evidence in his own defence and shall tell him in ordinary language what the effect will be if, when so called upon, he refuses to be sworn or affirmed, and thereupon the court shall call upon the accused to give evidence.

189.—(1) The accused or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution.

(2) He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

(3) If any accused person elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence.

190. In all cases the counsel for the Public Prosecutor shall have the right to reply on the whole case, whether the accused adduces evidence or not.

195.—(1) In any criminal proceedings except an inquiry preliminary to committal for trial, the accused shall not be entitled to make a statement without being sworn or affimed, and accordingly, if he gives evidence, he shall do so on oath or affirmation and be liable to cross-examination; but this subsection shall not affect the right of the accused, if not represented by an advocate, to address the court otherwise than on oath or affirmation on any matter on which, if he were so represented, the advocate could address the court on his behalf.

(2) If the accused —

(a) after being called upon by the court to give evidence or after he or the advocate representing him has informed the court that he will give evidence, refuses to be sworn or affirmed; or

(b) having been sworn or affirmed, without good cause refuses to answer any question,

the court, in determining whether the accused is guilty of the offence charged, may draw such inferences from the refusal as appear proper.

(3) Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn or affirmed in the circumstances described in paragraph (a) of subsection (2)."

What has become the standard allocution given to the accused pursuant to section 188(2) was given by the presiding judge to each of the appellants at their trials. Chua J. addressed Haw Tua Tau in the following terms: —

"... we find that the prosecution has made out a case against you on both the charges on which you are being tried which if unrebutted would warrant your conviction. Accordingly, we call upon you to enter upon your defence on both the charges.

Before any evidence is called for the defence we have to inform you that you will be called upon by the court to give evidence in your own defence. You are not entitled to make a statement without being sworn or affirmed and accordingly, if you give evidence, you will do so on oath or affirmation and be liable to cross-examination. If after being called by the court to give evidence you refuse to be sworn or affirmed or having been sworn or affirmed you, without good cause, refuse to answer any question, the court in determining whether you are guilty of the offence charged, may draw such inferences from the refusal as appear proper.

There is nothing in the Criminal Procedure Code which renders you compellable to give evidence on your own behalf and you shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn or affirmed when called upon by the court to give evidence. We now call upon you to give evidence in your own defence. If you have any difficulty in deciding whether or not you wish to give evidence on your own behalf you may consult your counsel."

Section 188(1) states the conditions precedent to the right and duty of the judge of trial to call on the accused to enter on his defence. It takes the form of a double negative: if the court does *not* find that *no* case against the accused has been made out which, if unrebutted, would warrant his conviction. For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the court to do so.

The crucial words in section 188(1) are the words "if unrebutted", which make the question that the court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words "if unrebutted" refer. What they mean is that for the purpose of reaching the decision called for by section 188(1) the court must act on the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before

a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided; questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, *if it were to be accepted by the jury as accurate,* would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is *some* evidence, the judge must let the case go on. It is not the function of the jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect would be a conditional verdict of guilty before the accused had an opportunity of putting before them any evidence in his defence. On the question of the accuracy of the evidence of any witness jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction", within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

Although section 188(1) first became law in 1960 and so forms no part of the amendments made by Act No. 10 of 1976, their Lordships have dealt with its interpretation at some length because in the judgment of the Court of Criminal Appeal of Singapore in the case of *Ong Kiang Kek* v. *Public Prosecutor*[2] there are certain passages that seem, upon a literal reading, to suggest that unless at the end of the prosecution's case the evidence adduced has already satisfied the judge beyond a reasonable doubt that the accused is guilty, the judge must order his acquittal. But this can hardly have been what that court intended, for it ignores the presence in the section of the crucial words "if unrebutted", to which in other passages the court refers, and it converts the hypothetical question of law which the judge has to ask himself at that stage of the proceeding: "If I were to accept the prosecution's evidence as accurate *would* it establish the case against the accused beyond a reasonable doubt?" into an actual and quite different question of fact: "Has the prosecution's evidence already done so?" For the reasons already discussed their Lordships consider this to be an incorrect statement of the effect of section 188(1).

Turning now to the amendments made by Act No. 10 of 1976. Section 195(1) withdraws from accused persons the anomalous privilege which they previously enjoyed of making unsworn statements of fact without subjecting themselves to cross-examination. It was not contended on behalf of any appellant that this of itself involved a breach of any fundamental rule of natural justice.

Section 195(2) provides expressly that the court may draw such inferences as may appear proper from the failure of the accused to give evidence on oath. This, in their Lordships' view, made no change in the existing law. The Criminal Procedure Code was previously silent on the matter, and consequently section 5 made applicable the law of England relating to criminal procedure where it was not inconsistent with the Code. English law has always recognised the right of the deciders of fact in a criminal trial to draw inferences from the failure of a defendant to exercise his right to give evidence and thereby submit himself to cross-examination. It would in any event be hopeless to expect jurors or judges, as reasonable men, to refrain from doing so. Although the Criminal Evidence Act, 1898, prohibited the prosecution itself from inviting the jury to draw inferences from the accused's failure to testify in his own defence, it did not prohibit judges from commenting on such failure; very often the judge did comment and draw to the attention of the jury inferences that they might properly draw, if they thought fit, from the failure of the accused to go into the witness box to contradict the evidence of the prosecution on matters that were within his own knowledge or to displace a natural inference as to his mental attitude at the time of the alleged offence that, in the absence of some other explanation, would properly be drawn by any reasonable person from his conduct at that time.

Their Lordships do not find it useful to refer to recent English authorities on this subject. They are directed to the propriety of comments made by English judges to English juries in particular cases, under a system of procedure under which the jury and not the judge is the sole decider of primary facts and inferences to be drawn from them, and the accused still has the option to make an unsworn statement

instead of giving evidence. Neither of these features of a criminal trial in England continues to exist in Singapore. What inferences are proper to be drawn from an accused's refusal to give evidence depend upon the circumstances of the particular case, and is a question to be decided by applying ordinary commonsense — on which the judiciary of Singapore needs no instruction by this Board.

Section 195(3) makes it clear that the accused has a legal right to refuse to give evidence at his trial; no legal sanctions can be imposed upon him if he chooses to remain silent. It is only if he elects to give evidence that he exposes himself to the risk of being compelled, under threat of legal sanctions, to answer questions put in cross-examination which, if answered truthfully, might tend to show that he was guilty of the offence with which he was charged. Subsection (4), which is not reproduced above, preserves to him substantially the same protection as a defendant had previously enjoyed from being compelled to answer questions which would elicit his criminal record or which, if answered, might tend to show that he had committed any crime other than that for which he was being tried.

So, in the absence of any legal compulsion on the accused to give evidence, the appellants are driven to base their argument on the contention that the procedure for which section 188(2) provides of calling on the accused at the conclusion of the prosecution's case to give evidence and informing him of the consequences of a refusal to do so, has the practical effect of putting the accused under a compulsion to give evidence no less than if he were compelled by law to do so, despite his being told in the course of the standard allocution that he is not. Fundamental rules of natural justice, say the appellants, are concerned with the practical effect upon the defendant of the procedure followed, not with its legal technicalities; and if, as the appellants claim, the maxim *nemo debet se ipsum prodere* enshrines a fundamental rule of natural justice, the procedure prescribed by section 188(2) infringes it.

In order to dispose of these appeals, however, their Lordships do not find it necessary to decide whether by virtue of that maxim it should be recognised, as a fundamental rule of natural justice under the common law system of criminal procedure, that a person who is standing trial before a court of justice charged with an offence which he does not admit, must not be ordered by the court, under threat of legal sanctions in the event of disobedience, to disclose what he knows about the matter which is the subject of the charge. Such a rule finds no place in the Universal Declaration of Human Rights proclaimed by the United Nations in 1948 nor in the European Convention on Human Rights of 1950. Its non-observance involves no conflict with the undoubted fundamental rule of natural justice stated in Article 6(2) of the Convention: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"; and in many countries of the non-communist world, whose legal systems are not derived from the common law, the court itself has an investigatory role to play in the judicial process for the trial of criminal offences. In such systems interrogation of the accused by a judge, though not direct interrogation by the prosecution, forms an essential part of the proceedings.

Nevertheless, in considering whether a particular practice adopted by a court of law offends against a fundamental rule of natural justice, that practice must not be looked at in isolation but in the light of the part which it plays in the complete judicial process. Their Lordships accordingly recognise that the fact that under a system of justice in which the court itself is invested with what are in part inquisitorial functions, compelling an accused to answer questions put to him by a judge would not be regarded as contrary to natural justice, does not necessarily justify compelling the accused to submit to hostile interrogation by the prosecution at a trial in which the procedure is predominantly, if not exclusively, adversarial.

Their Lordships recognise, too, that what may properly be regarded by lawyers as rules of natural justice change with the times. The procedure for the trial of criminal offences in England at various periods between the abolition of the Court of Star Chamber and High Commission in the seventeenth century and the passing of the Criminal Evidence Act in 1898 involved practices, particularly in relation to the trial of felonies, that nowadays would unhesitatingly be regarded as flouting fundamental rules of natural justice. Deprivation until 1836 of the right of the accused to legal representation at his trial and, until 1898, of the right to give evidence on his own behalf are obvious examples. Nevertheless, throughout all that period the rule that an accused person could not be *compelled* to submit to hostile interrogation even in trials for misdemeanours, at which he was a competent witness on his own behalf, remained intact; and if their Lordships had been of the opinion that there was any substance in the argument that the effect of the amendments made to the Criminal Procedure Code by Act No. 10 of 1976 was to create a genuine *compulsion* on the accused to submit himself at his trial to cross-examination by the prosecution, as distinguished from creating a strong *inducement* to him to do so, at any rate if he were innocent, their Lordships, before making up their own minds, would have felt it incumbent on them to seek the views of the Court of Criminal Appeal as to whether the practice of treating the accused as not compellable to give evidence on his own behalf had become so firmly based in the criminal procedure of Singapore that it would be regarded there by lawyers as having evolved into a fundamental rule of natural justice by 1963 when the Constitution came into force.

There is, however, in their Lordships' view, no substance in the appellants' argument. The accused is not compelled in law to give evidence on his own behalf. Section 195(3) says so, and section 188(2) requires that the accused be told so. Even before section 195(1) withdrew the former option to make an unsworn statement, instead of going into the witness box to give evidence, the accused, if he were properly advised by counsel, would be aware that adverse inferences might well be drawn if he failed to go into the witness box; the strength

of those inferences depending upon the nature of the evidence that had been adduced against him in the particular case. This in itself would be a strong inducement to an accused to give evidence, particularly if he were innocent. The only added inducement consequent on the removal of the option is the withdrawal of the hope that he can get away with a story the truth of which cannot be tested by cross-examination. The inferences that the court may draw from his failure to testify are not enlarged by the amendments to the Code; they are limited, as they have always been, to such inferences as appear to the decider of fact to be proper in the particular case having regard to all its circumstances.

It was suggested on behalf of the appellants that the fact that the accused is formally "called on" by the court itself to give evidence provides in itself an element of compulsion; but this occurs only after he has been told by the court that he is not compelled to do so and there has been explained to him what the effect of a refusal will be, i.e. that such adverse inferences as are proper may be drawn from his refusal. In their Lordships' view it is only fair that an accused who is not legally represented should be warned of the risks he runs by failing to give evidence. Where the accused is legally represented the standard allocution ends with a recommendation to the accused to consult with his own counsel who can advise him (as he would have done even if there had been no formal "calling upon") whether or not it is in the accused's own interests to testify on his own behalf.

Inducement there is and always has been since the accused first became a competent witness on his own behalf; compulsion there is not. Their Lordships have no doubt at all that the amendments to the Criminal Procedure Code made by Act No. 10 of 1976 are consistent with the Constitution of Singapore and are valid.

Finally their Lordships would mention briefly, lest it be thought that they had overlooked it, the suggestion that at the trial of Haw Tua Tau the judges may have taken literally those delphic passages in the judgment of the Court of Criminal Appeal in *Ong Kiang Kek* v. *Public Prosecutor* to which their Lordships have had occasion to refer. If this be so the only effect can be that the judges applied to the prosecution's evidence a more rigorous test of credibility than they need have done before deciding to call on Haw Tua Tau to give evidence. The error, if there was one — and there is nothing in the judges' reasons for judgment to indicate what was the standard that they did apply — can only have been in favour of the accused. In the other two appeals where the offence was trafficking in diamorphine, the statutory presumptions which this Board upheld in *Ong Ah Chuan* v. *Public Prosecutor* have the effect of making the two standards the same as respects inferences to be drawn as to the guilty knowledge of the accused, from the fact of their being in possession of the drugs.

Order accordingly.

Solicitors: *Kingsford Dorman; Coward Chance; Philip Conway Thomas & Co.; Jaques & Co.*

SINGAPORE REPORTS

PORT OF SINGAPORE AUTHORITY v. J.B. WALLACE

[C.A. (Wee Chong Jin C.J., Kulasekaram & Rajah JJ.) October 9, 1980]

[Singapore — Civil Appeal No. 98 of 1979]

Employment — Traffic offence — Conviction by District Court — Appeal allowed by High Court — Termination of contract of service — Whether facts amounted to misconduct justifying dismissal.

Employment — Wrongful dismissal — Traffic offence — Misconduct not connected with business of employers — Facts not amounting to misconduct to justify dismissal.

The appellants in this case employed the respondent as a harbour pilot on a two-year contract commencing on March 2, 1972. Before the term expired the appellants terminated the respondent's employment from September 15, 1973 by a letter dated September 13, 1973 as a result of the respondent's conviction in a District Court and his sentence of nine months' jail for causing the death of a farmer by negligent driving on April 26, 1973.

On September 11, 1973 the respondent was convicted in a District Court on five charges, namely:

(1) causing death by a negligent act;

(2) failing to stop after an accident;

(3) failing to report an accident;

(4) failing to render assistance; and

(5) moving his car without authority.

His defence against the said charges was that he was not the driver of the vehicle at the time of the accident. His appeal against the convictions was allowed by the High Court on April 17, 1974. On November 25, 1975 the respondent commenced the present proceedings against the appellants for damages for wrongful dismissal.

The learned trial judge held, *inter alia*, that even if it were proved that the respondent had failed to report the accident and to render any assistance, that would not amount to misconduct justifying the termination of the respondent's employment under clause 14(c)(iii) of the Contract of Service which was relied on by the appellants. The relevant part of clause 14(c)(iii) reads "This agreement may, however, be determined without notice and without payment of salary in lieu thereof by the authority in the event that:—

(iii) the pilot has misconducted himself in such a way as to seriously prejudice, interfere with, or affect the interests of the authority to its detriment."

Held, dismissing the appeal: (1) the misconduct alleged against the respondent was in no way connected with the business of the appellants who were the authority responsible for the safe navigation of vessels entering or leaving the port of Singapore;

(2) it was not misconduct incompatible with the due or faithful discharge of the respondent's duty qua his employment as a harbour pilot, and not the kind of misconduct which could reasonably be said to seriously prejudice or interfere with or affect the interests of the appellants to its detriment;

(3) the trial judge was justified in holding that the respondent was entitled to succeed on the action for wrongful dismissal.

CIVIL APPEAL.

P. Selvadurai for the appellants.

G. Pannirselvam for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the Court): The appellants, the Port of Singapore Authority, employed the respondent, John Bryson